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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

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No. 35467-5-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

NORTHWEST PROPERTIES UNLIMITED, LLC,
a Washington Limited Liability Company,

Respondent,

v.

GLACIER WATER PRODUCTS, LLC,
a Washington Limited Liability Company,

Appellant.

APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

This appeal arises because the trial court interpreted a provision requiring the tenant to pay a late charge of \$150 per day in a lease agreement (“Agreement”) between Defendant/Appellant Glacier Water Products, LLC (“GWP”) and Plaintiff/Respondent Northwest Properties Unlimited, LLC (“NWP”) as “compounding”, resulting in late charges totaling \$236,700 over a ten-month period, when the rent plus triple net over the same period, including interest, totaled \$102,051.79. The late charge is an unenforceable penalty whether or not it is compounding. GWP also appeals because the trial court did not adjust the damages for future rents awarded to NWP to the present value as required by the Agreement. GWP requests reversal of these rulings.

Should GWP prevail on these challenges, it requests this Court reinstate its counterclaims for unjust enrichment and overpayment, reverse the award of attorney fees to NWP, and remand to the trial court for further proceedings.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in entering Findings of Fact ¶¶ 22, 23, 25, 26, 32 and 33 in its judgment entered on September 15, 2006, which are not supported by substantial evidence.

Finding of Fact ¶ 22: At the time of signature, the potential escalating damage from a long-term default to Plaintiff was difficult for the parties to quantify.

Finding of Fact ¶ 23: The parties understood that the provision would include an escalation of daily late charges in the event of a long-term default in rent spanning multiple months.

Finding of Fact ¶ 25: The escalating late charges agreed to in paragraph 8 provided a reasonable forecast of potential losses to Plaintiff from a long-term default.

Finding of Fact ¶ 26: The Plaintiff suffered considerable escalating damage from the Defendant's long-term default.

Finding of Fact ¶ 32: Between November 2004 and August, 2005, the Defendant was 1,578 days late in paying rent. The late charge provision agreed to by the parties calls for \$236,700.00 in late charges.

Finding of Fact ¶ 33: The late charges of \$236,700.00 represent a fair approximation of the damages actually suffered by Plaintiff as a result of the breach.

2. The trial court erred in entering Conclusions of Law ¶¶ 5 and 6 in its judgment entered on September 15, 2006.

Conclusion of Law ¶ 5: Under paragraph 8 of the lease, the Defendant is obligated to pay a late charge of \$150 per day for each day that a monthly rental payment remains late.

Conclusion of Law ¶ 6: Pursuant to paragraph 8 of the lease, Plaintiff is entitled to a reasonable late charge of \$236,700.00.

3. The trial court erred in entering Conclusions of Law ¶ 7 in its judgment entered on September 15, 2006.

Conclusion of Law ¶ 7: Enforcing the late charge to this extent is reasonable, and does not constitute a penalty.

4. The trial court erred in entering Conclusion of Law ¶ 13 in its judgment entered on September 15, 2006.

Conclusion of Law ¶ 13: The Defendant's counterclaims are without merit and Defendant's requests for equitable relief are denied.

5. The trial court erred in entering Conclusions of Law ¶¶ 16 and 17 in its judgment entered on September 15, 2006.

Conclusion of Law ¶ 16: Plaintiff is further entitled to reasonable attorney's fees under the terms of its lease in the amount of \$24,570.55.

Conclusion of Law ¶ 17: Plaintiff is also entitled to costs incurred in the amount of \$1,234.56.

6. The trial court erred in denying defendant's motion to reconsider and amend judgment by order entered on October 13, 2006.

Issues Pertaining to Assignments of Error

1. May a late charge provision be enforced as liquidated damages, when the provision is not supported by evidence showing the late charge was reasonably related to a genuine pre-estimate of actual damages, the damages are readily ascertainable under the contract, and there are no actual damages to which the non-breaching party is entitled not already awarded under the contract? (Assignments of Error 1 and 3.)
2. May a provision of a lease be reasonably interpreted to require a substantial, compounding late charge when such a construction is strained, and the evidence does not clearly establish the intent of parties? (Assignments of Error 1 and 2.)

3. May a provision in a lease granting remedies to the landlord be reasonably interpreted such that the second portion of the provision which reduces a judgment for future rent losses to present value does not apply? (Assignment of Error 6.)
4. Where Defendant paid Plaintiff in excess of the judgment, is Plaintiff entitled to retain those funds? (Assignment of Error 4.)
5. When Plaintiff is no longer a prevailing party, may Plaintiff collect attorney fees and costs? (Assignment of Error 5.)

III. STATEMENT OF THE CASE

Defendant Glacier Water Products, LLC (“GWP”) is in the business of selling water obtained from the Carbon Glacier on Mt. Rainier. (RP at 215–6.) Plaintiff Northwest Properties Unlimited, LLC (“NWP”) owns commercial property in Puyallup, Washington. (CP at 102 ¶ 1.)

NWP and GWP executed a five-year lease on August 20, 2004 (“Agreement”) for warehouse and office space in NWP’s building, to commence in October 2004. (Ex. 1; RP at 103 ¶ 2.) The Agreement originally covered only suites E, F, G and H. Initially the monthly rent, including triple net, for these suites was \$8,627.85, with a 3% per year increase after the first 24 months. (Ex. 1, at 1–2.) The rent was later adjusted to \$7,451.85 to reflect the actual square footage rented while certain tenant improvements called for by the lease remained incomplete.

(CP at 103 ¶ 3.) GWP occupied Suites E, F, G and H for one year, from October 2004 through September 2005. (CP at 104 ¶ 13; RP at 31.) Approximately five months after GWP vacated the premises, suites E, F, G and H were re-let to a third party, Brite Lite Welding. (CP at 104 ¶¶ 13, 16; RP at 81.)

The Agreement contains provisions for permanent office tenant improvements to be made to the property by NWP. GWP was responsible for \$30,000 of the tenant improvements, with \$15,000 due at the beginning of the lease, and \$15,000 (and specified adjustments) due once NWP completed improvements. (Ex. 1, Ex. C.) NWP did not complete construction of the permanent office improvements. (CP at 103 ¶ 9.) Construction on these improvements did not begin until after GWP had vacated the premises. (*Id.*) The Agreement provides for interest of 12% on any outstanding payment due to NWP. (CP at 103 ¶ 5.)

The parties executed an addendum to the lease on October 11, 2004, adding Suite D for an additional rent, including triple net, of \$1,607.40 monthly. (CP at 103 ¶ 4.) GWP occupied Suite D for approximately five months, until the lease for the space was terminated by agreement between the parties. (RP at 31–2.) The parties agreed that GWP owed NWP \$8,037.00 in rent plus \$519.38 in interest for the breach of the lease for Suite D. (CP at 103 ¶ 4, 104 ¶ 19.)

The following lease provisions are at issue in this appeal:

8. LATE CHARGE. If tenant fails to make any rent within 10 days of the date such amount is due, the tenant shall also pay a late charge of \$150.00 per day said rents remain late. Late charges will continue to apply until all late fees have also been paid. [sic] OR otherwise negotiated in writing by both Landlord and Tenant.

24. REMEDIES UPON DEFAULT.

(a) Remedies. ... Tenant shall pay any such deficiency each month as the amount thereof is ascertained by Landlord or, at Landlord's option, Landlord may recover in addition to any other sums, the then present value of the amount at the time of judgment by which the unpaid Rent for the balance of the term after judgment exceeds the amount of Rent loss which Tenant proves could be reasonably avoided, discounted at the rate of seven percent (7%).

(Ex. 1.)

GWP made a payment of \$18,423.42 to NWP at the commencement of the lease. (CP at 105 ¶ 27.) GWP then made payments of \$7,200.00 in August 2005 and \$243,200.000 in September 2005. (*Id.*) In total, GWP paid \$268,823.42 to NWP.

The parties tried the case to the court. The parties did not dispute GWP's liability for breach of the lease. Instead, the trial focused on the damages due to NWP, including the late charge, costs of improvements, damages for the time the property was vacant, consequential damages, and attorney fees and costs.

The trial court entered judgment for NWP on September 15, 2006, concluding:

(1) Paragraph 8 obligated GWP to pay a late charge of \$150 per day for each day that each monthly payment remained late. (CP at 106 ¶ 5.) It was calculated that between November 2004 and August 2005, GWP was 1,578 days late in paying rent, resulting in aggregate late charges of \$236,700. (CP at 105 ¶ 32.)

(2) Enforcing the late charge provision was reasonable, and did not constitute a penalty. (CP at 107 ¶ 7.) At the time the lease was executed, the potential escalating damage from a long-term default to Plaintiff was difficult for the parties to quantify. (CP at 104 ¶ 22.) The late charges of \$236,700 represented a fair approximation of damages actually suffered by NWP as a result of the breach. (CP at 105 ¶ 33.)

(3) With regard to Suites E, F, G and H, the unpaid balance of the rent and triple net totaled \$558,489.12 plus \$4,073.21 of interest. (CP at 104 ¶¶ 14–15.) As NWP re-let the premises to a third party, the amount of rent due was offset by \$356,388.25. (CP at 104 ¶ 18.)

(4) GWP's counterclaims for refund of overpayment and unjust enrichment were without merit. (CP at 107 ¶ 13.)

(5) The judgment against GWP, after all payments were taken into account, amounts to \$226,994.00, plus attorney fees of \$24,570.00 and costs of \$1,234.56. (CP at 107 ¶ 15, 108 ¶ 16.)

On September 22, 2006, GWP filed a Motion to Reconsider and Amend Judgment with the trial court. (CP at 115–6.) In that motion, GWP requested that the trial court apply paragraph 24(a) of the Agreement, quoted above, to the unpaid rent. (CP at 115–6.)

Application of Paragraph 24(a) of the Agreement would have reduced the amount of the unpaid future rents to present value using a 7% discount rate, resulting in a reduction in the judgment by \$31,759.03. (CP at 115–6.) The trial court denied this motion on October 13, 2006. (CP at 141.)

GWP filed its Notice of Appeal on November 13, 2006, which was consolidated with an earlier imperfect Notice filed on October 12, 2006. (CP at 131–140, 150–159.)

IV. SUMMARY OF ARGUMENT

GWP respectfully requests the reversal of the trial court findings (1) that the late charge provision of paragraph eight is reasonable, and does not constitute an unenforceable penalty; (2) interpreting the late charge provision of paragraph eight to “compound” the charge is reasonable, and embodies the intent of the parties; (3) that the present value discount required by paragraph 24(a) of the lease does not apply to the award of future rent losses; (4) that GWP’s counterclaims do not have

merit; and (5) the award of attorney fees and costs to NWP as the prevailing party.

First, paragraph eight of the Agreement requires GWP to pay a late charge of \$150 per day that the rents remain unpaid. This late charge is a penalty that should not be enforced by the courts. NWP presented no evidence that both parties reasonably expected the harm NWP claimed for a long-term default, particularly because NWP's remedies were clearly identified and integrated into the Agreement. Further, there was no evidence that the damages were difficult to quantify. The late charges for only one year, totaling \$236,700.00, *are more than twice* the \$102,051.79 due for rent and triple net, including interest, due for that same period. This fact alone indicates that the late charge provision is not compensatory, but is instead punitive.

Second, NWP argued that the provision required the late charge to "compound" or "stack," meaning that the daily late charge applied to each monthly payment outstanding. Despite the plain language of the term and rules of construction requiring reading the lease in favor of the tenant, the trial court agreed with NWP. The interpretation advocated by NWP is unreasonable, and it is clear from the testimony at trial that this was not an interpretation that the parties understood at the time the parties entered into the Agreement.

Third, paragraph 24(a) of the lease requires any judgment covering a future rent payment to be discounted to its present value at the contractual rate of seven percent. The plain language of the lease provision requires this discount. The trial court erred when it did not apply this provision to the future rents due.

Finally, if GWP should prevail on its other arguments, it is entitled to have the case remanded, both for further consideration of its counterclaims—to seek the funds it has overpaid to NWP—and the award of attorney fees and costs.

V. ARGUMENT

A. The late charge provision is a penalty because it is not reasonably related to a prediction of actual damage, the damages are readily calculated, and the damages are disproportionate to the harm actually suffered.

The \$150 per day late charge constitutes a penalty, not reasonable liquidated damages. At trial, NWP alleged consequential damages to support this penalty. (RP at 336–7). Specifically, NWP relied on its anticipated income from GWP to begin financing and construction on another parcel of land. (RP at 62.) However, when GWP went into default, NWP's bank refused to continue financing the matter until the default was cured. (RP at 95-96.) According to NWP, these delays resulted in substantial cost increases. (RP at 156.) There is nothing in the record, though, to establish that NWP ever informed GWP of these risks *at the*

time of contracting. Indeed, the Agreement is integrated and specifically identifies those remedies to which NWP was entitled, thereby putting GWP on notice of those remedies available—future rent, past due rent, interest, costs to re-let, and attorney fees and costs. (Ex. 1, ¶¶ 24 and 39.) All of these remedies are readily calculated, and the late charges are a penalty as a matter of law.

1. Standard of Review

Factual findings are reviewed for “substantial evidence,” which is evidence sufficient to persuade a fair-minded person. *Tostado v. Tostado*, ___ Wash. App. ___, 151 P.3d 1060 (2007). Legal determinations are reviewed *de novo*. *Id.* The reasonableness of a liquidated damages clause is a question of law, and receives *de novo* review. *See Walter Implement*, 107 Wash.2d at 558–9.

It is a basic principle of contract law that damages for a breach of contract should be compensatory, rather than punitive. The general measure of damages for breach of contract is that the injured party is entitled (1) to recovery of all damages that accrue naturally from the breach, and (2) to be put into as good a pecuniary position as he would have had if the contract had been performed. *Eastlake Const. Co., Inc. v. Hess*, 102 Wash.2d 30, 39, 686 P.2d 465 (1984). Damages are recoverable only for losses that were reasonably foreseeable by the party

to be charged when the contract was made. *Larsen v. Walton Plywood Co.*, 65 Wash.2d 1, 6, 390 P.2d 677 (1964). An injury is foreseeable if it is one that follows the breach in the usual course of events. *Id.* at 683. Neither the specific injury nor the amount of harm must be foreseen. *Id.*; see also *Barnard v. Compugraphic Corp.*, 35 Wash. App. 414, 667 P.2d 117, 120 (1983).

This underlying principle is recognized in the distinction between an enforceable liquidated damages clause and an unenforceable penalty. While a “genuine covenanted pre-estimate of damages” will be enforced, where the purpose of the clause is one of punishment, not compensation, the provision is a penalty, and is unenforceable. *Management, Inc. v. Schassberger*, 39 Wash.2d 321, 326, 235 P.2d 293 (1951); see also *Mahoney v. Tingleywash*, 85 Wash.2d 95, 98, 529 P.2d 1068 (1975). The decisive factor is whether the provision represents a reasonable prediction of the harm *when the contract was formed*. *Watson v. Ingram*, 124 Wash.2d 845, 853, 881 P.2d 247 (1994); *Wallace Real Estate Investment, Inc. v. Groves*, 124 Wash.2d 881, 893, 881 P.2d 1010 (1994).

The determination of whether a liquidated damage provision is unenforceable as a penalty depends on the facts and circumstances of each case. *Walter Implement, Inc. v. Focht*, 107 Wash.2d 553, 559, 730 P.2d 1340 (1987). Generally speaking, Washington courts favor liquidated

damages clauses in contracts, and will uphold those provisions that were “fairly and understandingly entered into by experienced, equal parties with a view to just compensation.” *Id.* at 558. A penalty, on the other hand, is a

sum inserted in a contract, not as the measure of compensation for its breach, but rather as a punishment for default.... It is the payment of a stipulated sum on breach of contract, irrespective of the damage sustained. Its essence is a payment of money stipulated as *in terrorem* of the offending party, while the essence of liquidated damages is a genuine covenanted pre-estimate of damages.

Buchanan v. Kettner, 97 Wash. App. 370, 373, 984 P.2d 1047 (1999) (quoting *Management, Inc.*, 39 Wash.2d at 326 (quoting 15 Am. Jur. 672, *Damages* § 241)); see also *Brower Co. v. Garrison*, 2 Wash. App. 424, 433, 468 P.2d 469 (1970) (“A liquidated damage clause becomes a penalty when the amount fixed has an *in terrorem* effect of inducing performance rather than compensating loss.”). Therefore, liquidated damages clauses are upheld only if the following two factors are satisfied: (1) the amount fixed must be a reasonable forecast of just compensation for the harm that is caused by the breach; and, (2) the harm must be such that it is incapable or very difficult of ascertainment. *Walter Implement*, 107 Wash.2d at 559.

While proof of actual damages is not a requirement for upholding a liquidated damages clause, actual damages may be considered where they are so disproportionate to the estimate that to enforce the estimate would be unconscionable. *Wallace Real Estate Investment*, 124 Wash.2d at 889.

Courts have upheld contracts containing liquidated damage clauses in cases of breach of land sale contracts and breach of construction contracts. *See, e.g., Watson*, 124 Wash.2d at 853–4 (land sale contract); *Brower Co.*, 2 Wash. App. at 435–6 (construction contract). However, lease agreements are inappropriate for liquidated damage clauses because damages can be easily anticipated and ascertained.

For example, *Walter Implement* involved an equipment lease for a period of five years. 107 Wash.2d at 554–5. The lease gave the lessor several options in case of default, two of which contained liquidated damages clauses. *Id.* at 555. The liquidated damages consisted of twenty percent of the aggregate minimum lease charges remaining at the time of default. *Id.* at 556.

The court determined that the twenty percent liquidated damages clause was an unenforceable penalty. *Id.* at 561. The court noted that a clause containing a variable may be reasonable. *Id.* The variable, however, had no relation to the actual damages suffered. *Id.* (citing *American Fin. Leasing & Servs. Co. v. Miller*, 322 N.E.2d 149 (1974)). Furthermore, the actual damages were easily ascertained because the amount of damages could be calculated from the rental contract and depreciation of the equipment. Therefore, the liquidated damages clause failed. *Id.*

2. The Late Charge

In this case, the court concluded that “[e]nforcing the late charge...does not constitute a penalty.” (CP at 107 ¶ 7.) The trial court’s factual findings supporting this legal conclusion were that “the potential escalating damage from a long-term default to [NWP] was difficult for the parties to quantify,” (CP at 104 ¶ 22), and “late charges of \$236,700.00 represent a fair approximation of the damages actually suffered by [NWP] as a result of the breach” (CP at 105 ¶ 33). These findings of fact and law are not supportable based on the evidence presented.

3. The Contemplation of the Parties

The liquidated damages clause is unenforceable because the damages are not a reasonable prediction of actual contemplated damages that would be incurred due to GWP’s breach. C. Curtis Hood (“Hood”), sole member and manager of NWP (RP at 80, 116), testified that he purchased the land at issue here, including construction costs on the necessary buildings with a \$2.2 million loan from his bank. (RP at 60.) Hood initially divided the property into two parcels. (RP at 63.) He saved the second parcel for later development as a “small insurance policy” if he got into serious financial trouble. (RP at 63.) The loan was secured by his home, a personal guarantee, the assets to his heating company, and his personal investment of \$500,000. (RP at 60–61.) The bank expected to be

repaid by Hood's income generation and from the rent of the parts of the building he did not use. (RP at 62.) Hood then testified that at the time the late charge was negotiated, he was concerned about receiving sufficient compensation to cover the construction on this adjacent lot, as well as taxes and loan payments on both properties. (RP at 96-97.)

There is no evidence in the record that Hood ever told GWP that its rent was necessary to support his other ventures. To the contrary, the Agreement actually contained an integration clause. (Ex. 1 ¶ 39(a) ("Lease contains the entire agreement between Landlord and Tenant concerning the leasing of the Premises.")) It also provided for identified remedies should GWP breach the Agreement. (Ex. 1 ¶ 24.) These are the damages that GWP could reasonably expect if it defaulted on the Agreement.

GWP could only predict damages for those risks to which it was alerted. *Watson*, 124 Wash.2d at 853 (reasonable prediction of both parties when contract formed). Hood simply wanted to make the late charge sufficiently onerous to ensure enforcement of the lease payment, *not* as a calculation of damages for any breach that might ensue. This is the clear definition of a penalty. *Buchanan*, 97 Wash. App. at 373. Hood's own personally held fears about damages beyond those addressed in the Agreement could not be contemplated by the parties if Hood never communicated them to GWP. For this reason there is no basis to support

the trial court's finding that the parties could not quantify the anticipated damages.

4. Damages Are Calculable

All of the damages contemplated by the parties in this case are easily calculated. The Agreement explicitly provides for awards of past rent due, interest, future rent, costs and damages related to re-letting the property, and attorney fees and costs if GWP breached. (Ex. 1, ¶¶ 24, 25.) Each was in fact awarded by the trial court, and each was capable of ready determination. (CP at 103–108; *see also* CP Attachment (Verbatim Report of Proceedings, heard July 31, 2006, filed August 28, 2006.)

5. No Actual Damages

Other than those damages allowed by the Agreement, NWP presented no evidence of actual damages reasonably contemplated by the parties. Hood testified that during the period GWP was NWP's tenant, he did not miss any payments on his bank loans, property taxes or insurance. (RP at 304). In short, outside of the costs incurred in attempting to collect the back rent, and securing a replacement tenant (both of which were awarded by the trial court's judgment), NWP suffered no damages beyond the value of the lease itself. Thus, these late charges are so disproportionate to the estimate that the awarded amount is unconscionable.

6. Relief Requested

For these reasons, GWP respectfully requests that this Court find that paragraph eight of the lease is unenforceable as a penalty and reverse the trial courts factual findings and legal conclusions.

B. Paragraph eight of the lease agreement may not be reasonably interpreted to require compounding the \$150 per day charge.

Should this Court determine that the liquidated damages clause is not a penalty, then it may not be reasonably interpreted to require compounding the \$150 per day charge. Paragraph eight of the August 2004 lease requires the tenant to pay a late charge “per day said rents remain unpaid.” (Ex. 1 ¶ 8.) The trial court first determined that the meaning of paragraph 8 could not be determined without extrinsic evidence. (CP at 106 ¶ 4.) Rather than adopting the interpretation most favorable to GWP, the trial court found that this provision called for “compounding” or “stacking” of the late charges, meaning that the \$150 per day charge was due for each day the monthly payment remained outstanding. (CP at 106 ¶ 5.) The provision cannot be reasonably interpreted to require stacking under Washington law, but simply calls for a single \$150 per day late charge, regardless of the number of months of payment outstanding.

1. Standard of Review

To the extent a lease is a contract, it is governed by the rules of contract interpretation. *Emrich v. Connell*, 105 Wash.2d 551, 716 P.2d 863 (1986). The court's goal in interpreting a contract is first and foremost to ascertain the parties' intent. *Anderson Hay & Grain v. United Dominion Indus. Inc.*, 119 Wash. App. 249, 254, 76 P.3d 1205 (2003) (citing *Kenney v. Read*, 100 Wash. App. 467, 474, 997 P.2d 455 (2000)). If only one reasonable meaning can be ascribed to a contractual clause, that meaning necessarily reflects the parties' intent. *Kenney*, 100 Wash. App. at 475. If only one meaning is available, interpretation of the provision is a question of law. *See id.* Questions of law are subject to de novo review. *See, e.g., Rasmussen v. Bendotti*, 107 Wash. App. 947, 954, 29 P.3d 56 (2001).

2. Parties' Intent

Where the provision is capable of multiple reasonable interpretations, or interpreting the provision requires the use of extrinsic evidence, then the court must determine the parties' intent. *Kenney*, 100 Wash. App. at 475. What the parties intend is generally a question of fact, *id.*, and is subject to substantial evidence standard on review.

In determining the parties' intent, the court should consider the contract as a whole, the subjective and objective matter of the contract, the circumstances surrounding the making of the contract, the subsequent acts

and conduct of the parties to the contract, and the reasonableness of the respective interpretations advocated by the parties. *Berg v. Hudesman*, 115 Wash.2d 657, 667, 801 P.2d 222 (1990) (quoting *Stender v. Twin City Foods, Inc.*, 82 Wash.2d 250, 254 (1973)). Any evidence of subsequent conduct should be considered only so far as it reflects on the intent of the parties at the time of contracting. *See, e.g., Eurick v. Pemco Ins. Co.*, 108 Wash.2d 338, 340, 738 P.2d 251 (1987) (“[T]he court’s duty is to determine the parties’ intent *at the time of contracting.*”) (emphasis added).

The Agreement is a form lease provided by the landlord, NWP. Ordinarily, language in a contract should be construed against the drafter. *Berg*, 115 Wash.2d at 677 (citing *Guy Stickney, Inc. v. Underwood*, 67 Wash.2d 824, 827, 410 P.2d 7 (1966)). In this case, however, paragraph 39(e) requires interpretation of the Agreement “without consideration or weight being given to its having been drafted by any party hereto or as counsel.”

The objective of the lease for GWP was to allow it to further its business by appropriately storing its inventory. (RP at 217.) For NWP, the objective was to make sufficient revenue to, at minimum, cover the cost of owning the property. (RP at 62.)

Hood as well as Joon Choe (“Choe”) and John Destito (“Destito”), managing members of GWP, testified at trial that the monetary terms of paragraph 8 were a subject of some negotiation (RP at 94, 177–9, 227–8.) The parties agree that the original proposed clause called for a late charge figured on the amount of square footage leased, and that GWP, upon figuring the charge at over \$200 per day, objected. (RP at 94, 177–8, 227.) The parties negotiated the charge down to \$150 per day. (*Id.*)

The parties disagree, however, on the interpretation of the late charge as “compounding.” Hood testified that his interpretation of the late charge provision as compounding was “very clear” to the other parties. (RP at 94.) When queried on the basis for his statement, he mentioned a comment made by Choe, that the late charges get “very large,” and could bankrupt GWP if they failed to pay for six months. (RP at 152.) Choe’s statements, however, are extremely subjective, and there is no evidence that Hood ever sought to clarify what Choe meant by them. These statements alone are not a sufficient basis to establish that both parties understood Hood’s interpretation at the time the contract was negotiated.

Choe testified that he never understood the late charge provision to be compounding, and that there was never any discussion about stacking or compounding the late charge. (RP at 179–80.) In fact, he testified that he “would have walked right away,” if it had even been suggested that the

provision called for compounding. (RP at 180.) Choe explained that he felt a late charge was “highly unusual” to begin with, and that, at most, he expected to see a small one-time flat late charge. (RP at 177–8.) Choe testified that, as a new business, GWP had the potential for cash flow problems, and a penalty of “\$150 a day 30 days a month amounts to a huge amount of money for us,” and would kill the company. (RP at 179–80.)

Hood further supported his understanding that it was “very clear” *at the time the parties entered into the Agreement* that the provision was compounding by pointing to *subsequent events*, such as his provision of spreadsheets showing the amount overdue. (RP at 152.) He claims that because neither Choe nor Destito objected to these calculations, the parties all understood his interpretation of the provision at the time the parties executed the Agreement. (RP at 152.)

Upon receiving a spreadsheet from Hood, however, Choe expressed surprise that the amount they owed was so large. (RP at 183.) Choe was concerned with not exacerbating the situation with Hood more than necessary, as being evicted from the premises would have “meant a certain death to certain of the things we were trying to accomplish.” (RP at 185.) Choe never openly objected to the numbers provided by Hood. (RP at 185.)

Destito's testimony is consistent with Choe's. Destito testified that compounding was never discussed by the parties, and that he first discovered Hood's interpretation in the first late notice they received. (RP at 229–30.)

3. *Reasonable Interpretation of the Late Charge Provision*

“The contract must be read as the average person would read it; it should be given a practical and reasonable rather than a literal interpretation, and not a strained or forced construction leading to absurd results.” *Eurick*, 108 Wash.2d at 341 (internal quotes and cites omitted). Where a provision is capable of two constructions, if one construction would make the contract “unreasonable and imprudent” and the other would make it “reasonable and just,” the courts are urged to adopt the latter construction. *Berg*, 115 Wash.2d at 672. Furthermore, if “the provisions of a lease are doubtful, in that they are reasonably capable of more than one interpretation, the court will adopt that interpretation which is the more, or most, favorable to the lessee.” *Blume v. Bohanna*, 38 Wash.2d 199, 202, 228 P.2d 146 (1951) (emphasis added).

In *Blume*, the court reviewed a residential lease contract with the following clause:

The Lessee may, at its option, obtain a renewal of this lease for a further term of equal duration and upon like terms and conditions by giving to the Lessor notice of intention to

renew not less than sixty (60) days prior to the expiration of the terms herein specified, subject to the consent of the Lessor.

Id. at 200. The landlord contended that she had the right to refuse renewal if the terms were not acceptable at that time. *Id.* at 201. The court interpreted the clause, applying the rule that an ambiguous lease term must be construed in favor of the tenant (among other rules of construction) to determine that the tenant had a right of first negotiation to re-let the property. *Id.* at 204–5.

Here, the trial court erred because it adopted the landlord’s position, finding that the \$150 per day charge applied to each month’s late payment separately, and is therefore “compounding” or “stacking.” (CP at 106 ¶ 5.) This finding contravenes the rule of *Blume* as a matter of law.

Under NWP’s interpretation, if one month’s payment is outstanding, the late charge is \$150 per day. If, however, two months’ payment is outstanding, the late charge is \$300 per day. If six months’ payment is outstanding, the late charge is \$900 *per day*. At that rate, the landlord could earn an amount equal to the entire month’s rent in just over one week. The interpretation of the provision to allow compounding is a stretch of the plain language of the provision, and is not a “practical” or “reasonable” construction, particularly because it is the *least* favorable interpretation to GWP, the tenant.

The trial court adopted NWP's interpretation, applying a compounding formula and awarding a total of \$236,700 in aggregate late charges to NWP, calculated as \$150 a day for 1,578 days late in payment. (CP at 105 ¶ 33.) This covered the non-payment by GWP from November 2004 through August 2005, a period of 294 days. During this same ten-month period, the past rent and triple net due, including interest, for suites D, E, F, G, and H totaled \$102,051.79. (Ex. 37.)

A more reasonable interpretation, and one which favors the lessee, is that the provision requires a single \$150 per day late charge, whether there is one or two or six months' payment outstanding. The provision uses the plural term "rents" which indicates that this interpretation is correct. (Ex. 1 ¶ 8.) A single late charge applies to all *rents* that are late. If NWP, as the landlord, had intended the provision to compound, it should have drafted the provision more clearly.

Despite Hood's testimony that his interpretation of the provision was "very clear," both of GWP's principals testified that their understanding of the provision was different from Hood's at the time the lease was negotiated and entered into. Further, Hood's interpretation is not the most favorable to the tenant, but in fact is the least favorable. The trial court erred when it adopted the interpretation set forth by NWP, and its finding should be reversed as a matter of law.

4. *Relief Requested*

GWP respectfully requests that this court reverse, and reduce the damages awarded to NWP as to the late charges to \$150 a day, for 294 days, or \$44,100.

C. Paragraph 24(a) of the lease agreement requires a discount to present value of any judgment for unpaid future rent.

GWP appeals the trial court's failure to apply the present value calculations to the future rents as required by Paragraph 24 of the Agreement. Paragraph 24 grants the landlord certain remedies upon default of the lease. (Ex. 1, ¶ 24). Subsection (a) gives the landlord the right to terminate the lease, re-enter and repossess the property. (*Id.*) It also establishes continuing liability for the balance of the lease term, including liability for any deficiency from re-letting the property at a lesser rent, plus any additional expenses incurred in re-letting the property. (*Id.*)

The trial court applied this part of paragraph 24(a) to reach the conclusion that the balance due on the lease was \$558,489.12. (CP at 104.) This balance was offset by \$336,338.25 of damages avoided by re-letting the property. (CP at 104.) The total lost rent equaled \$230,137.87. (CP at 104.) This amount includes past rent and triple net for Suite D, as well as both past and future rent and triple net for Suites E, F, G, and H.

GWP filed a CR 59 motion to reconsider and amend the judgment, asking the trial court to correct calculation errors or oversights made in determining the balance of rent due and owing to NWP. The trial court apparently overlooked a provision in Paragraph 24(a) that allows the landlord to collect only the present value of the judgment for unpaid rent in a period after judgment. (Ex. 1, ¶ 24(a).) The lease calls for the discount to be at a rate of seven percent. (Ex. 1, ¶ 24(a).)

The trial court denied the motion to reconsider and amend the judgment. In its oral ruling, the trial court stated that it reviewed the whole of paragraph 24(a), and reached its initial ruling based on the plain language of the section. (RP at 433.) The court gave no grounds for its conclusion that the discounting portion of the provision did not apply.

An issue is adequately preserved for appeal through a motion for reconsideration, even if not raised during trial. *Newcomer v. Masini*, 45 Wash.App 284, 287, 724 P.2d 1122 (1986). GWP properly raised the issue through its CR 59 motion, as a method allowing the trial court the opportunity to correct a clear and manifest error, rather than taking time and expense to appeal the issue. GWP did not ask the court to consider new evidence or even a new theory of recovery, as the entire lease was properly before the court.

The plain language of Paragraph 24(a) requires that a judgment for future rents be discounted. Where a provision is capable of only one reasonable interpretation, the parties' intent is clear, and interpretation of the provision is a question of law. *Kenney*, 100 Wash. App. at 475. The parties' clear intent here was to discount the award of any future rent payments by seven percent, the agreed upon formulation to reach the present value of that judgment.

GWP, therefore, respectfully requests that this court reverse the trial court, and hold that the present value discount of paragraph 24(a) applies to the award of future rent loss, and either reduce the judgment for future rents to present value using the seven percent discount agreed to by the parties or remand for further proceedings to establish the correct amount for the rent loss including the discount to present value.

D. GWP is entitled to recoup monies in excess of the judgment paid to NWP.

GWP brought counterclaims against NWP in order to recoup monies paid in excess of judgment. The trial court held that these claims had no merit, in light of a judgment entitling NWP to \$226,994.04 in damages. (CP at 107.)

If this Court reverses the trial court's judgment on one or more issue, reducing GWP's liability to less than \$0, GWP's claims to recoup

overpayment will have merit. GWP respectfully requests that its counterclaims be remanded to the trial court for further proceedings.

E. If NWP is not the prevailing party, it is not entitled to attorney fees and costs.

Paragraph 25 of the lease grants the landlord the right to seek attorney fees and costs incurred in pursuing remedies under the lease. (Ex. 1, ¶ 25.) The trial court granted NWP reasonable fees and costs, as the prevailing party. (CP at 108.)

Washington law entitles the prevailing party to collect attorney fees and costs where a provision in a contract or lease provides for fees and costs for at least one of the parties. RCW 4.84.330. A prevailing party is defined as “the party in whose favor final judgment is rendered.” *Id.*

In the event this court reaches a judgment such that NWP is no longer the prevailing party or not the substantially prevailing party, GWP respectfully requests reversal of the trial court’s award of attorney fees and costs.

VI. CONCLUSION

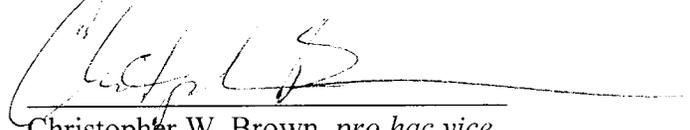
GWP requests that this Court find paragraph eight unenforceable as a penalty. In the alternative, GWP respectfully requests that this Court reverse the trial court’s finding that paragraph eight compounds the late charge, and reduce the damages awarded to NWP as to the late charges to \$44,100.

GWP requests that this Court reverse the trial court's ruling to not apply the present value discount of paragraph 24(a).

GWP also requests remand to the trial court for further proceedings to determine the correct amount for the rent loss award, including the discount to present value, as well as on GWP's counterclaims and on the award of attorney fees and costs.

DATED this 28th of March, 2007.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "C. W. Brown", is written over a horizontal line.

Christopher W. Brown, *pro hac vice*
Christy O. King, WSBA # 37217

Attorneys for Glacier Water
Products, LLC,
Appellant

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VII. APPENDIX

LEASE AGREEMENT

THIS LEASE is entered into between Northwest Properties, LLC (Landlord) and Glacier Water Products, LLC (Tenant) as tenants in common.

Kelly Bryson
Office Manager
Pat Bryson
Warehouse Manager

Lease Date: 98375
Premises: 5526 184th Street E. Puyallup, WA Suite E, F & G & H
Lease Commencement Date: 10-1-'04 or ASAP
Lease Term: FIVE (5) year initial term
Lease Extension Options: TWO (2) Five (5) year options \$15,855 S/F (840 down) = 1,680 S/F
Initial Base Rent: \$ 7,200.90 per month Warehouse & office space
Initial Additional Rent: \$ 1,426.95 per month (NNN) charges @ \$.09 S/F

1. **PREMISES** Landlord hereby leases to Tenant, upon the terms and conditions of this Agreement, a portion of the real property situated in the City of Pierce County, Washington, commonly known as 5526 184th St. E. and legally described on the attached Exhibit A (including land, building, and improvements, the "Property" or the "Business Park"). The portion of the Property leased to Tenant ("Premises") is Suite E & F & G and outlined on the sketch attached hereto as Exhibit B, which building contains approximately 15,855 square feet of rentable space.

2. **TERM** The term ("Lease Term") of this Lease is 5 years. The Lease term shall begin on the Rent Commencement Date defined below. If the Lease Commencement Date is a day other than the first day of a calendar month, then the Lease Term shall expire on the date which is the Lease Term period from the first day of the month after the Rent Commencement Date, and Tenant shall be deemed to have been given early occupancy as of the Rent Commencement Date under all terms of this Lease, including Rent, and other amounts due to Landlord, applicable to the period of early occupancy. The parties acknowledge that certain obligations under this Lease may be due before the Rent Commencement Date, including without limitation construction, hold harmless, liability insurance, etc. The parties agree they are bound by such obligations prior to commencement of the Lease Term. As used in this Lease, "Lease Year" means each successive period of twelve months, the first Lease Year beginning on the Rent Commencement Date and ending on the first anniversary of such Date if it falls on the first day of a month, or the first day of the following month if it does not.

3. **RENEWAL OPTION** Tenant shall have the option to renew the Lease for two (2) additional term(s) of five (5) year(s).

4. **CONSTRUCTION: ACCEPTANCE OF PREMISES**

(a) **Landlord's Work** Landlord agrees that it will, at its cost, pursue to completion the Premises to the extent specified in Exhibit C as "Landlord's Work". The Landlord's Work shall be completed on or before *** ("Completion Date"). The taking of possession of the Premises by Tenant shall constitute its acknowledgment that the Landlord's Work has been fully performed as agreed, that the Premises are then in good and tenable condition and as represented by Landlord, and that Landlord has fully complied with all of Landlord's obligations regarding the condition of the Premises.

(b) **Delay in Completion** If Landlord cannot deliver possession of the Premises to Tenant by the Completion Date for any reason, Landlord shall not be subject to any liability therefore, nor shall such failure affect the validity of this Lease or the obligations of Tenant hereunder. In such case, the Completion Date (and the Rent Commencement Date) shall be extended a period of time equal to the period of any delay in delivery of possession of the Premises. Tenant shall not be obligated to pay Rent until possession of the Premises is tendered to Tenant, provided, however, that if Landlord has not completed the Landlord's Work within ninety (90) days from the original Completion Date, then Tenant may cancel this Lease by giving Landlord notice within ten (10) days from the expiration of such sixty day period. Upon such effective notice, the parties shall be discharged from all obligations under this Lease.

(c) **Early Occupancy** If Tenant occupies the Premises before the Completion Date, such occupancy shall constitute the Rent Commencement Date and shall be subject to all the terms of this

980 CC H
*** Work to be completed within 45 days of receiving final T.I. building permits.

Landlord shall provide a copy of the Lease Term and Tenant shall pay it for each period at the initial monthly rates set forth below, prorated for partial months.

5. RENT COMMENCEMENT DATE The "Rent Commencement Date" shall be the date on which the Premises are occupied or one month following when the Premises are ready for occupancy, whichever comes first. Upon Tenant's occupancy of the Premises, the parties shall complete and execute a Commercial and Territorial Date Agreement in the form attached to this Lease as Exhibit D.

6. RENT

(a) Covenants to Pay Rent Tenant covenants and agrees to pay Rent to Landlord on or before the first (1st) day of each calendar month during the Lease Term. "Rent" is all amounts due from Tenant under this Lease, including Basic Rent and Additional Rent, as defined below. Payment shall be made to Landlord or to such other party as Landlord may designate. Tenant's obligations to pay Basic Rent and Additional Rent are absolute and unconditional, and shall not at any time be subject to offset, discount, or reduction of any kind whatsoever. The duty to pay Basic Rent and Additional Rent is a covenant of the Tenant which is independent of any and all undertakings, covenants or warranties of Landlord, and no claimed breach or default on the part of the Landlord will justify or excuse the failure to make such payments on the dates specified.

(b) Basic Rent Beginning on the Rent Commencement Date and continuing on the first day of each month until (but not including) the expiration date of the Lease Term, Tenant covenants and agrees to pay monthly Basic Rent, in advance, to Landlord as basic minimum rental for the Premises. The initial "Basic Rent" is \$7,200.90 (dollars) (\$7,200.90) per month and is subject to adjustments as provided below.

(c) Annual Basic Rent Adjustments The monthly Basic Rent due under this Lease shall be subject to annual adjustments on the anniversary of the Rent Commencement Date of each year to increase the Basic Rent by 3 percent (3%) over the Basic Rent in effect for the previous twelve months. Landlord agrees to commence the Annual 3% increase beginning on the 25th Monthly payment and until the lease is terminated

(d) Additional Rent This is a "triple-net" lease, which means that Tenant is to pay its percentage share of all costs of ownership, management, operation and maintenance of the Premises throughout the Lease Term. Therefore, in addition to the Basic Rent required above, Tenant agrees to pay Landlord "Additional Rent" based upon Tenant's Percentage Share of the of the Operating Expenses (defined below) incurred by Landlord related to the Premises and the Property in each Accounting Period. An "Accounting Period" is a calendar year except that the first Accounting Period shall commence on the Rent Commencement Date and the last Accounting Period shall end on the date the Lease Term expires or terminates. The initial Additional Rent under this Lease is dollars (\$) per month, in advance. If the Tenant occupies an entire building, then Tenant will pay one hundred percent (100%) of the Operating Expenses for the Property described on Exhibit A.

and for any and all extensions.

(e) Initial Payments Upon execution of this Lease, Tenant shall pay to Landlord the sum of \$18,423.42 dollars (\$) to be applied to the Basic Rent due for the 1st & last month(s) of the Lease Term. Payment also includes (2) months of (NNN) @ \$1,426.95 each and a \$500.00 utility deposit of \$500.00

7. ADDITIONAL RENT

(a) Percentage Share Tenant's "Percentage Share" of Operating Expenses is approximately \$.09 S/F per month for (NNN) charges. This amount may vary annual depending on cost increases. Landlord shall notify Tenant, in writing of any increase at least (30) days in advance of any justified increase. Taxes, insurance, building damage or road/parking lot repairs.

(b) Operating Expenses In this Lease, "Operating Expenses" means all costs of ownership, management, operation, maintenance and security of the Premises, all such costs of the Business Park and its common areas allocable or assessed to the Premises, all such costs including without limitation, the following: janitorial, cleaning, landscaping, guard and other services; costs incurred in connection with any attempts to control trespassing, picketing, demonstrations, gatherings or assemblies, vandalism, thefts, and any other interferences with the use of common areas; gas, electricity, water, sewer, waste disposal, and other utilities; heating, ventilation and air-conditioning, window-washing; materials and supplies; painting, repairs, and other maintenance; parking lot resurfacing and restriping, as well as cleaning, sweeping, and ice and snow removal; maintenance, repair, replacement, permanent change and service of equipment, including without limitation the HVAC system, alarm systems, elevator equipment, and other equipment; reserves for any common area improvements; costs of independent contractors; Landlord's management fees and expenses; audit expenses; insurance and insurance deductibles of any kind; taxes, assessments and other governmental and utility charges of any kind; premiums and other costs for Landlord's insurance expenses on the Premises; the cost of any repair, renovation, alteration, and improvement required to be made by Landlord under any governmental law, rule or regulation; depreciation on personal Premises; supplying directional signs,

other matters, and can retain an allowance to Landlord for Landlord's supervision of maintenance and operation of the common areas and any other expense in charge which in accordance with generally accepted accounting and management principles would be considered a cost of ownership, management, operation, and maintenance of the Premises. Landlord shall determine Operating Expenses and their allocation to tenants.

(c) Payment Adjustments Upon the Rent Commencement Date, Landlord shall submit to Tenant a statement of the anticipated monthly Additional Rent for the period between such commencement and the following January, and Tenant shall pay this amount of Additional Rent on a monthly basis concurrently with the payment of the Basic Rent. Tenant shall continue to make said monthly payments until notified by Landlord of a change thereof. By March 1st of each year, Landlord shall endeavor to give Tenant a statement showing the total Operating Expenses for the Property for the prior calendar year and Tenant's Percentage Share thereof, prorated from the commencement of Lease Term. If the total Additional Rent which Tenant made for the prior calendar year is less than the Tenant's Percentage Share of the actual Operating Expenses, then within ten (10) days after receipt of such statement from Landlord, Tenant shall pay (i) the difference in a lump sum, and (ii) shall concurrently pay the difference in monthly Additional Rent payments made in the then current calendar year and the amount of monthly payments which Landlord has estimated based on the prior year's experience and based upon the entire amount of Landlord's estimate of additional maintenance items (including major items such as asphalt resurfacing or re-roofing) to be done in that calendar year. Any overpayment by Tenant shall be credited towards the monthly Additional Rent next coming due. Landlord shall determine and adjust the Additional Rent payments each calendar as provided in this paragraph. Even though the term of this Lease or any extension has expired and Tenant has vacated the Premises, Tenant shall immediately pay any increase due over the estimated Additional Rent previously paid and, conversely, any overpayment made shall be immediately rebated by Landlord to Tenant when the final determination of Tenant's actual Additional Rent is made. Failure of Landlord to submit statements as called for herein shall not be deemed a waiver of Tenant's requirement to pay rents as herein provided. Landlord's good faith determination of actual Additional Rent shall be conclusive on the parties. Upon Tenant's failure to pay any portion of Additional Rent, estimated or actual adjustments, Landlord shall have the rights and remedies under this Lease for the failure of Tenant to pay Rent.

8. LATE CHARGE: If tenant fails to make any rent within 10 days of the date such amount is due, the tenant shall also pay a late charge of \$150.00 per day said rents remain late. Late charges will continue to apply until all late fees have also been paid. OR otherwise negotiated in writing by both Landlord and Tenant.

9. SECURITY DEPOSIT. Tenant has deposited Five Hundred dollars (\$500.00) as a security deposit to be held by Landlord for Tenant's faithful performance of all of its obligations under this Lease. If there is a Tenant Default under this Lease, including without limitation failure to pay Rent, Landlord may (but is not required to) use, apply or retain all or any part of this security deposit to pay Rent or any other amount due under this Lease, including expenses, damages and other compensation to which Landlord is entitled by reason of Tenant's Default. If any portion of the security deposit is so used, then within ten (10) days after written demand, Tenant shall deposit cash with Landlord in an amount sufficient to restore the security deposit to its original amount. Landlord shall not be required to keep this security deposit separate from its general funds, and Tenant is not entitled to interest on the security deposit. If Tenant fully and faithfully performs all of its obligations under this Lease, the security deposit or any remaining balance shall be applied to the last month's Rent of the Lease Term. If Landlord assigns its interest in the Property and this Lease, it shall also transfer the security deposit to Landlord's successor in interest.

10. USE OF PREMISES

(a) Business Purpose. The Premises are to be used for the purpose of conducting thereon a manufacturing, warehouse and office for its water business and for no other purpose without written consent of Landlord. In no event will the Tenant use or permit the Premises to be used for any purpose which violates any zoning or other ordinance, any law or ordinance relating to Hazardous Substances, or any other law or ordinance.

(b) Hazardous Waste. Tenant represents and warrants to Landlord that no Hazardous Substance will be generated, stored, or disposed of on, under or in the Premises. As used in this Lease, the term

"Hazardous Substances" means any hazardous liquid or dangerous substances, waste or materials, which now or will in the future be regulated under any federal state or local state ordinance, rule, regulation or other law now or in the future in effect pertaining to the protection of the environment or human health, including environmental contamination or clean up, including without limitation any substance, waste or material which is now or will in the future be designated as hazardous in (or for purposes of) the Comprehensive Environmental Response, Compensation and Liability Act (42 U.S.C. 9601 *et seq.*), Resource Conservation and Recovery Act (42 U.S.C. 6901 *et seq.*), The Federal Water Pollution Control Act (33 U.S.C. 1252, *et seq.*), the Clean Air Act (42 U.S.C. 7001 *et seq.*) or the Model Toxics Control Act (RCW 70.105D 0-10 *et seq.*) Tenant shall indemnify, protect, defend and hold Landlord harmless from and against any damage, loss, expense, or liability resulting from any breach of this representation warranty, including without limitation all attorney's fees and costs. This indemnity shall survive the term of this Lease.

(c) Rules & Regulations Tenant shall use the Premises and the Property common areas designated by Landlord and as limited or otherwise restricted by Landlord in accordance with such reasonable rules and regulations not inconsistent with this Lease as may from time to time be made by Landlord for the general safety, comfort, and convenience of Landlord and the Property tenants. Tenant shall cause its employees, agents, invitees, and licensees to abide by such rules and regulations. Landlord shall not be responsible to Tenant for the non-performance of any rules or regulations by any other tenants, occupants, or users of the Property.

(d) Parking Tenant shall have the right to use, in common with other tenants or occupants of the Property, the parking facilities of the Property subject to the rules and regulations and any charges of Landlord for such parking facilities which may be established or altered by Landlord at any time or from time to time during the term hereof. Tenant and Tenant's employees shall park only in areas designated by Landlord and as limited or otherwise restricted by Landlord. Landlord shall have the right to make changes to the common areas including, without limitation, changes in the location of driveways, entrances, exits, vehicular parking spaces, parking area, and the direction of the flow of traffic. Landlord shall provide _____ (14) parking spaces for Tenant.

11. REPAIRS The Premises have been inspected, or if construction or alteration thereof is contemplated then the Premises will be inspected when Tenant assumes possession. Upon acceptance of possession the Tenant waives any claim that the Premises are deficient in any respect, except only for any exceptions noted in writing by Tenant and consented to in writing by Landlord. Tenant will at all times keep the Premises neat, clean and in a sanitary condition. Tenant will replace all cracked or broken glass in all windows or doors. Except for reasonable wear and tear and damage by fire or unavoidable casualty, Tenant will at all times preserve the Premises in as good repair as they are now or may hereafter be put to. All repairs shall be at Tenant's sole cost and expense, except for repairs required for the outside roof, walls and foundation. Tenant agrees that at the expiration or sooner termination of this Lease, Tenant will quit and surrender the Premises without notice, and in a neat and clean condition, and will deliver up all keys belonging to said Premises to the Landlord or Landlord's agents. Tenant will, at all times, cause the Premises to comply with all ordinances, regulations, rules or orders of every governmental entity undertaking jurisdiction over the Premises. To the extent that any damage to the Premises is covered by insurance the Landlord will aid the Tenant in efforts to obtain any proceeds from such insurance for reimbursement for sums reasonably expended by Tenant.

12. ALTERATIONS Tenant shall not make any alteration, addition or improvement in the Premises without the prior consent of Landlord. Landlord may condition its consent upon assurance that all work shall comply with all applicable federal, state and local laws, ordinances, rules and regulations and its review and approval of plans and construction contracts. No alteration, addition or improvement may be done except by a licensed contractor approved by Landlord. Any and all alterations, additions and improvements shall be made at Tenant's sole expense and, with the exception of trade fixtures, shall become the property of the Landlord, and shall remain in and be surrendered with the Premises as a part thereof at the termination of this Lease, without disturbance, molestation or injury. Landlord may require Tenant to remove any such alterations at Tenant's sole cost and expense. Tenant shall indemnify, protect, defend and hold Landlord and its employees and agents harmless from damage, claims, loss or expense arising out of any alteration, addition or improvement requested or made by Tenant, including all attorney's fees, court costs and other litigation expenses. Tenant agrees that Landlord has the right to make alterations to the Premises, to the building in which the Premises are situated, and to the Property, and Landlord shall not be liable for any damage which Tenant might suffer by reason of such undertaking.

13. SIGNS All signs or symbols placed by Tenant in the windows, doors ~~or~~ of the Premises, or upon any part of the Property, shall be subject to the prior approval of the Landlord. Any signs placed on the Premises shall be so placed upon the understanding and agreement that Tenant will remove them at the termination of the tenancy and repair any damage or injury to the Premises caused thereby, and if not so

removed by Tenant over. Landlord may have signs removed at Tenant's expense. The Landlord may require that all signs on or about the Property be of a uniform size, shape and appearance. Upon notice from the Landlord reasonably specifying such size, shape and appearance, the Tenant will cause his signs to comply with such notice. Tenant must have all signs manufactured and installed by a firm approved in writing in advance by Landlord.

14. LIENS. Tenant has no authority to allow any liens to be filed against the Property. Tenant shall not suffer or permit any lien to be filed against the Property or any part thereof or the Tenant's leasehold interest, by reason of work, labor, services, or materials performed or supplied to Tenant or anyone holding the Property or any part thereof under Tenant. If any lien is filed against the Property as a result of services performed or materials furnished, Tenant agrees to cause such lien to be discharged prior to entry of final judgment (after all appeals) for the foreclosure of such lien and further agrees to indemnify, defend, protect and hold harmless the Landlord and any lender with a lien on the Property against liability, loss, damage, costs or expenses (including reasonable attorneys' fees, statutory costs, and all litigation expenses) on account of such claim of lien. Upon request of the Landlord, the Tenant agrees to promptly cause such lien to be released and discharged of record, either by paying the indebtedness which gave rise to such lien or by posting bond or other security as shall be required by law to obtain such release and discharge.

15. INSURANCE

(a) Liability Insurance. Without limiting the obligations and responsibilities of the Tenant under this Lease, Tenant shall, at its own expense, maintain adequate liability insurance with an insurance company or companies licensed to do business in Washington in the minimum amount of \$1,000,000 for property damage, and in the minimum amounts of \$2,000,000 (per individual) and \$2,000,000 (per accident) for personal injuries, to indemnify both Landlord and Tenant against any such claims, demands, losses, damages, liabilities and expenses. Landlord shall be named as one of the insured and shall be furnished with a copy of such policy or policies of insurance which shall bear an endorsement that the same shall not be canceled except upon ten (10) days prior written notice to Landlord. Neither the Tenant nor any of Tenant's officers, directors, employees, agents or shareholders will make any contention that any of them are an "Insured" or are entitled to insurance protection under any policy of liability insurance purchased by Landlord.

(b) Tenant's Liability & Property Insurance. Tenant shall, at Tenant's sole expense, maintain public liability and property damage insurance insuring against any and all claims for injury to or death of persons and loss of or damage to property occurring upon, in, or outside of the Property. Such insurance shall have liability limits of not less than \$2,000,000 in respect of injury or death to any one person, not less than \$2,000,000 in respect of any and one occurrence or accident, and not less than \$1,000,000 for property damage with a maximum deductible amount of \$1,000. All such insurance shall name Landlord and Tenant as co-insureds, with severability of interests endorsement. At Landlord's request, its lender with a lien on the Property shall also be a named insured. All such insurance shall be issued by carriers acceptable to Landlord and shall contain provision whereby the carrier agrees not to cancel or modify the insurance without thirty (30) days' prior written notice to Landlord. In no event shall the limits of said policies be considered as limiting the liability of Tenant under this Lease. All Policies must be on a "Per Occurrence" basis and not a "Claims Made Only" basis. On or before taking possession of the Property pursuant to this Lease, Tenant shall furnish Landlord with a certificate evidencing the aforesaid insurance coverage, and renewal certificates shall be furnished to Landlord at least thirty days prior to the expiration date of each policy for which a certificate was theretofore furnished.

(c) Tenant's Property Insurance. Tenant shall, at Tenant's sole expense, maintain on all of Tenant's personal property, fixtures and leasehold improvements on the Property, and all plate glass and other glass on the Premises, a policy of "all risk" hazard insurance in the amount of their replacement value. Such insurance shall name Landlord as an additional insured.

(d) Tenant's Insurance. Tenant shall provide Landlord with documentary evidence of the existence of the insurance coverage required in this Lease. All proceeds of Tenant's insurance shall be applied to Tenant's obligation to restore personal property, fixtures, and leasehold improvements under this Lease, and any proceeds of such insurance remaining after such restoration shall belong to Tenant. If Tenant fails to maintain any insurance required under this Lease, Landlord may do so, and Tenant shall upon demand reimburse Landlord for the full premium expense incurred.

(e) Landlord's Property Insurance. Landlord shall maintain on the Property a policy of "all risk" hazard insurance in the full amount of its replacement value. All such insurance shall name Landlord as insured and, at Landlord's election, its lender with a lien on the Property shall also be a named insured. All proceeds of any such insurance shall be paid to Landlord and applied to the restoration of

(c) Continuation If part of the Property or Premises is so taken, and neither Landlord nor Tenant objects to terminate this Lease, or until termination is effective, as the case may be, the Rent shall be so taken, the termination to be effective as of the later of thirty days after said notice or the date by which the termination is to be made by notice to the other party not later than thirty days after possession is economically feasible to continue this Lease in effect. Landlord may terminate this Lease. Termination of this Lease, if any part of the Property is so taken and, in the opinion of Landlord, it is not economically feasible to continue this Lease in effect, either party may terminate this Lease. If any part of the Property is so taken and, in the opinion of Landlord or Tenant, it is not economically feasible to continue this Lease in effect, either party may terminate this Lease under the power of eminent domain and, in the opinion of either party, a majority of five percent (25%) or more of the Property area. If twenty-five percent (25%) or more of the Property area is taken by any public authority under the power of eminent domain, this Lease shall terminate as of the date possession is taken by said public authority pursuant to such condemnation.

(a) Entire Taking If all of the Property are taken by any public authority under the power of eminent domain, this Lease shall terminate as of the date possession is taken by said public authority pursuant to such condemnation.

CONDEMNATION

(b) Repair If this Lease is not terminated under this Paragraph then the rent shall be abated to the extent the Premises are untenantable during the repair or reconstruction. The Lease Term shall not be extended by virtue of the Premises being untenantable for any period of time.

(a) Notice, Election to Repair If the Premises are damaged by fire or other casualty to an extent which makes the Premises or a significant part of the Property untenantable, then the Tenant shall give notice of such event to Landlord. Within ten (10) days after receipt of such notice, Landlord shall give Tenant notice whether Landlord elects to repair or replace the Premises or elects to terminate this Lease. If the Landlord fails to give notice of its intention within such time period, Tenant shall give Landlord notice that the decision by the Landlord is required and if Landlord does not elect to repair or replace within five (5) days after the second notice, this Lease shall terminate. If the Landlord elects to repair or rebuild, the Landlord will proceed to do so with reasonable diligence commencing upon settlement of any insurance claim or, if there is no such claim, as soon as practicable.

DAMAGE TO PREMISES

18 INDEMNITY BY TENANT Tenant agrees that Landlord shall not be liable for any claims for death of or injury to persons or damages to or destruction of property sustained by Tenant or by any other person on or outside of the Property, including without limitation the liability of the foregoing, any claims caused by or arising from the condition or maintenance of any part of the Property, unless such damage is caused by the sole negligence or intentional misconduct of Landlord. Tenant hereby waives and releases all claims therefor and agrees to indemnify, defend, protect and hold Landlord harmless against any such losses, damages, or liability or any expense (including all attorney's fees, court costs and other litigation expenses) incurred by Landlord in connection therewith.

17 WAIVER OF SUBROGATION Neither Landlord nor Tenant shall be liable to the other for loss arising out of damage to or destruction of the Premises, the Property, or the contents hereof, when such loss is caused by any of the perils included within a standard form of fire and extended coverage insurance against loss or damage by fire, wind storm, hail, explosion, automobile collision, smoke or riot. Such absence of liability shall exist whether or not the damage or destruction is caused by the negligence of either Landlord or Tenant, or their respective agents, servants or employees.

16 ACCIDENTS, LIABILITY AND INDEMNIFICATION Landlord and its employees shall not be liable to the Tenant or the Tenant's employees, partners, vendors, invitees, or any other persons for any such injury to such persons or for damage to personal property caused by an act, omission, or negligence of Tenant or Tenant's agents. Tenant shall indemnify, defend, protect and hold Landlord and its employees and agents harmless from any and all claims for such injury and damages, whether the injury occurs on or off the Premises or the Property, including all attorney's fees, court costs and other litigation expenses.

(f) Insurance Expenses, deductibles, co-payments, and all amounts incurred by Landlord for insurance required under this Lease shall be included within operating expenses for which Tenant shall pay. Additional Tenant is obligated to pay its proportionate share of the cost of the insurance maintained by Landlord. The Landlord will not unreasonably withhold consent to the Tenant insuring the premises under a blanket policy of insurance if all the Landlord's interests are protected.

The Premises for the entire term of this Lease shall be insured against fire and theft and the Tenant shall be responsible for the cost of such insurance.

abated in the same proportion as the portion of the Property so taken bears to the whole of the Property, and Landlord shall make such repairs or alterations, if any, as are required to render the remainder of the Property tenable.

(d) Compensation All damages and compensation awarded for the taking or damaging of all or any part of the Building or the Property shall belong to and be the property of Landlord, and Tenant hereby assigns to Landlord any and all claims to such award. Nothing herein contained shall be construed as precluding Tenant from asserting any claim Tenant may have against such public authority for disruption or relocation of Tenant's business on the Property.

21. ASSIGNMENT Tenant shall not let or sublet the whole or any part of the Premises nor assign this Lease or any part thereof without the consent of the Landlord which may not be unreasonably withheld. This Lease shall not be assignable by operation of law. If the Tenant is a corporation then the cumulative transfer, by any means, of voting control of Tenant of more than 49% of the value of all of the stock of the Tenant to any other party or parties shall be deemed an assignment and shall require Landlord's consent. If Landlord gives its consent to the sublet or assignment of this Lease, the assignor, any predecessor in interest to the assignor under this Lease, shall remain personally and directly liable for the payment of Rent and for all of the other obligations of Tenant under this Lease during the Lease Term and any extension through the exercise of any option outstanding at the time of the assignment. Landlord may assign its interest in this Lease without consent of Tenant.

22. ENTRY BY LANDLORD Landlord reserves, and shall at any and all times have the right to enter the Premises to inspect the same, to show said Premises to prospective purchasers or tenants, to post notices or non-responsibility, to repair the Premises and any portion of the building of which the Premises are part that Landlord may deem necessary or desirable, without abatement of rent, and may for that purpose erect scaffolding and other necessary structures where reasonably required by the character of the work to be performed, always providing that the entrance to the Premises shall not be blocked thereby, and further providing that the business of the Tenant shall not be interfered with unreasonably. Tenant hereby waives any claim for damages or for any injury or inconvenience to or interference with Tenant's business, any loss of occupancy or quiet enjoyment of the Premises, and any other loss occasioned thereby. For each of the aforesaid purposes, Landlord shall at all times have and retain a key with which to unlock all of the doors in, upon and about the Premises, excluding Tenant's vaults, safes and files, and Landlord shall have the right to use any and all means which Landlord may deem proper to open said doors in an emergency, in order to obtain entry to the Premises without liability to Tenant except for any failure to exercise due care for Tenant's property and any entry to the Premises obtained by Landlord by any of said means, or otherwise, shall not under any circumstances be construed or deemed to be a forcible or unlawful entry into or a detainer of the Premises or an eviction of Tenant from the Premises or any portion thereof.

23. TENANT'S DEFAULT Any one or more of the following events is a default and breach of this Lease ("Default") by Tenant.

- (a) Tenant vacates or abandons the Premises.
- (b) Tenant fails to make any payment of Rent or any other payment required to be made by Tenant hereunder, as and when due, and such failure continues ten (10) days after written notice thereof by Landlord to Tenant.
- (c) Tenant fails to observe or perform any of the covenants, conditions or provisions of the Lease to be observed, and such failure continues thirty (30) days after written notice thereof by Landlord to Tenant; provided, however, that if the nature of Tenant's Default is such that more than thirty (30) days are reasonably required for its cure, Tenant shall not be deemed to be in Default if it commences cure within said thirty (30) day period and thereafter diligently and continuously prosecutes such cure to completion.
- (d) (i) Tenant makes any general assignment or general arrangement for the benefit of creditors, or (ii) A petition is filed by or against Tenant to have Tenant adjudged a bankrupt, or (iii) a petition or reorganization or arrangement is filed under any law relating to bankruptcy (unless, in the case of a petition filed against Tenant, it is dismissed within sixty days), or (iv) a trustee or receiver is appointed to take possession of substantially all of Tenant's assets located at the Premises or of Tenant's interest in this Lease, and possession is not restored to Tenant within thirty days of such appointment, or (v) there is an attachment, execution or other judicial seizure of substantially all of Tenant's assets located at the Premises or of Tenant's interest in this Lease, and such seizure is not discharged in thirty days.

25. REMEDIES UPON DEFAULT

(a) Remedies. If there is a Default, Landlord may, at its option, immediately declare Tenant's rights under this Lease terminated, and relet the Property using such force as may be necessary, and repossess itself thereof, as of its former estate, and remove all persons and property from the Property. Notwithstanding any such reentry, the liability of Tenant for Rent under this Lease shall not be extinguished for the balance of the Lease Term or extended Lease Term, and Tenant shall make good to Landlord any deficiency arising from a reletting of the Property at a lesser Rent, plus the costs and expenses of renovating, altering and reletting the Property, including attorneys' fees and brokers' fees incident to Landlord's reentry or reletting. Tenant shall pay any such deficiency each month as the amount thereof is ascertained by Landlord or, at Landlord's option, Landlord may recover in addition to any other sums, the then present value of the amount at the time of judgment by which the unpaid Rent for the balance of the term after judgment exceeds the amount of Rent loss which Tenant proves could be reasonably avoided, discounted at the rate of seven percent (7%).

(b) Reletting. In reletting the Property, Landlord may grant rent concessions and Tenant shall not be credited therefor. Landlord has no duty to relet the Property in the event of a default by Tenant. Tenant acknowledges that if Tenant is in default under this Lease and at that time any other premises in the Building or other property owned by Landlord are available for Lease, Landlord has the right to lease such other premises, and this shall not reduce Tenant's obligations under this Lease through the remaining Lease term.

(c) Indemnities. No termination or expiration of this Lease shall be deemed to affect Landlord's right to enforce any indemnity or hold harmless obligation of Tenant under this Lease for matters which occurred prior to the termination or expiration of this Lease, or for any other remedy at law or in equity.

(d) Repetitive Defaults. If during the Lease Term Tenant commits acts or omissions of Default for which three or more default notices are given by Landlord (whether or not such Defaults are cured by Tenant), Landlord may elect to cause an early termination of this Lease notwithstanding the Lease Term provided in this Lease. Landlord's election to exercise its early termination rights shall be effective only upon written notice delivered to Tenant specifying Landlord's election to cause an early termination of this Lease. Such early termination shall be in effect when such written notice is provided to Tenant. Landlord's right of early termination shall be in addition to all other rights and remedies available to Landlord at law or in equity.

(e) Interest upon Default. If there is any Default, all unpaid Rent and other amounts past due under this Lease shall bear interest ("Default Interest") from the due date at the rate of five percent (5%) above BANK OF AMERICA prime rate as set from time to time and in no event shall this rate be less than twelve percent (12%).

(f) Remedies Cumulative. The specified remedies to which Landlord may resort under the terms of this Lease are cumulative and are not intended to be exclusive of any other remedies or means of redress to which Landlord may lawfully be entitled in case of any breach or threatened breach by Tenant of any provision of this Lease. In addition to the other remedies in this Lease provided, Landlord shall be entitled to the restraint by injunction of the violation, or attempted or threatened violation, of any of the covenants, conditions, provisions of this Lease.

25. COSTS, ATTORNEYS' FEES AND INTEREST. If Landlord employs an attorney or if Landlord brings suit to recover any rent due hereunder, or for breach of any other provision of this Lease or to recover possession of the Premises or to enforce or defend any rights under federal bankruptcy law, Landlord shall be awarded its attorney's fees, statutory court costs, and all other litigation costs and expenses expended or incurred in connection with such action and in any appellate or collection proceedings. All sums due from Tenant to Landlord shall bear interest at the Default Interest rate.

26. NON-WAIVER OF BREACH. Landlord's failure to insist upon strict performance of any of the covenants or agreements of this Lease, or to exercise any option herein conferred in any one or more instances shall not be a waiver or relinquishment of any Default nor shall any such approval constitute a waiver of the right to disapprove of any act in the future. The approval of any assignment of this Lease or of the subletting of the Premises or the approval of any variation from the strict requirements of this Lease shall not constitute a waiver of the right to refuse consent to any future assignment, subletting or variation. Tenant agrees that it will not rely upon nor ever assert the existence of any purported past or future approval, consent, or waiver from the Landlord not in writing and signed by the Landlord's president, or by a person previously designated in writing to have the authority to bind the Landlord to contracts.

27. REMOVAL OF PROPERTY In the event of any entry in or taking possession of the Premises, Landlord shall have the right, but not the obligation, to remove from the Premises all personal property located therein and to store the same in any place selected by Landlord, including but not limited to a public warehouse, at the expense and right of the owners thereof with the right to sell such stored property, without notice to Tenant, after it has been stored for a period of thirty (30) days or more. The proceeds of such sale shall be applied first to the cost of such sale, second to the payment of the charges for storage, if any, third to the payment of any sums of money which may then be due from Tenant to Landlord under any of the terms hereof, and the balance, if any, shall be paid to Tenant.

28. LANDLORD'S LIABILITY

(a) Limitations Anything in this Lease to the contrary notwithstanding, covenants, undertakings and agreements herein made on the part of Landlord are made and intended not as personal covenants, undertakings or agreements for the purpose of binding Landlord personally or the assets of Landlord except Landlord's interest in the Building, but are made and intended for the purpose of binding only the Landlord's interest in the Building, as the same may from time to time be encumbered. While Tenant may bring a legal action against Landlord, judgments may be enforced only against Landlord's interest in the Building. No personal liability or personal responsibility is assumed by, nor shall at any time be asserted or enforceable against, Landlord or its partners or agents or their respective heirs, legal representatives, successors, and assigns on account of this Lease or on account of any covenant, undertaking or agreement of Landlord in this Lease contained. Nothing in this paragraph shall impose any liability on Landlord that has been waived or released elsewhere in this Lease.

(b) Transfer of Landlord's Interest In the event of any transfer or transfers of Landlord's interest in the Property, other than a transfer for security purposes only, the transferor shall be automatically relieved of any and all obligations and liabilities on the part of Landlord accruing from and after the date of such transfer and Tenant agrees to attorn to the transferee. Any such transfer shall be made expressly subject to this Lease, and the transferee must assume Landlord's obligations hereunder.

29. HEIRS AND SUCCESSORS Subject to the provisions hereof pertaining to assignment and subletting, the covenants and agreements of this Lease shall be binding upon the heirs, legal representatives, successors and assigns of any or all of the parties hereto.

30. HOLD OVER If Tenant holds over the expiration of the Lease Term, such tenancy shall be for an indefinite period of time on a month-to-month tenancy, which tenancy may be terminable as provided by the laws of the State of Washington. During such tenancy Tenant agrees to pay to Landlord the rental and charges set forth in this Lease and to be bound by all of the terms, covenants, and conditions set forth herein so far as applicable.

31. NOTICES Any notice, approval, consent or request required or permitted under this Lease shall be in writing and shall be delivered to or mailed to the person entitled to receive the same at the address stated below or such other address as may be substituted by notice, or, if no address is specified then notice to the Tenant shall be given at the Premises. Such notices shall be deemed given on the day delivered or on the third business day after deposit in the U.S. mail, postage prepaid.

Notices to the Landlord shall be given to: Curtis Hood (253)380-1754
Northwest Properties Unlimited, LLC
5526 184th St. E., Suite A
Puyallup, WA 98375

Notices to the Tenant shall be given to (address) Joon Choe, VP (206)852-9428
Glacier Water Products, LLC
29700 SE Highpoint Way
P.O. Box 632 PRESTON, WA 98050-0632

Or if no address is specified, notices to the Tenant shall be given at the Premises

32. SUBORDINATION OF TENANT'S INTEREST This Lease is and shall be subordinate to any encumbrance now of record or any encumbrance hereafter recorded affecting the Property. Tenant shall attorn to any purchaser at any foreclosure sale, or to any grantee or transferee designated in any deed in lieu of foreclosure. Tenant shall execute any documents required by any such holder to accomplish the purposes of this section, including subordination, non-disturbance and attornment agreements and estoppel certificates, and in such form as the lender may require and is consistent with commercial lending practices. Tenant's failure to promptly execute such documents shall be a Default under this Lease.

33. ESTOPPED CERTIFICATES. Upon Landlord's written request, Tenant shall execute, acknowledge and deliver to Landlord a written statement certifying: (a) that none of the terms or provisions of this Lease have been changed (or if they have been changed, stating how they have been changed); (b) that this Lease has not been canceled or terminated; (c) the last date of payment of the rent and other charges and the time period covered by such payment; (d) that Landlord is not in default under the Lease (or, if Landlord is claimed to be in default, stating why); and, (e) such other representations or information with respect to Tenant of the Lease as Landlord may reasonably request or which any prospective purchaser or encumbrance of the Property may require. Tenant shall deliver such statement to Landlord within ten (10) days after Landlord's request. Landlord may give any such statement by Tenant to any prospective purchaser or encumbrance of the Property. Such purchaser or encumbrance may rely conclusively upon such statement as true and correct. If Tenant does not deliver such statement to Landlord within said ten (10) day period, Landlord, and any prospective purchaser or encumbrance may conclusively presume and rely upon the following as facts: (i) that the terms and provisions of this Lease have not been changed except as otherwise represented by Landlord; (ii) that this Lease has not been canceled or terminated except as otherwise requested by Landlord; (iii) that not more than one (1) month's rent or other charges have been paid in advance; and (iv) that Landlord is not in default under the Lease. If Tenant does not deliver such statement to Landlord within said ten (10) day period, Tenant shall be estopped from denying the truth of the above.

34. TENANT'S FINANCIAL CONDITION. Within ten (10) days after written request from Landlord, Tenant shall deliver to Landlord such financial statements as Landlord reasonably requires to verify the net worth of Tenant or any assignee, subtenant, or guarantor of Tenant. In addition, Tenant shall deliver to any lender designated by Landlord any financial statements required by such lender to facilitate the financing or refinancing of the Property. Tenant represents and warrants to Landlord that each such financial statement is a true and accurate statement as of the date of such statement. All financial statements shall be confidential and shall be used only for the purposes set forth in this Lease.

35. PERSONAL PROPERTY TAXES. Tenant shall pay or cause to be paid before delinquency any and all taxes levied or assessed and which become payable during the term hereof upon all Tenant's leasehold improvements, equipment, furniture, fixtures and any other personal property located in the Premises. In the event any or all of the Tenant's leasehold improvements, equipment, furniture, fixtures, and other personal property shall be assessed and taxed with the real property, Tenant shall pay to Landlord its share of such taxes within ten (10) days after delivery to Tenant by Landlord of a statement in writing setting forth the amount of such taxes applicable to Tenant's property.

36. RULES AND REGULATIONS. Tenant shall faithfully observe and comply with the rules and regulations that Landlord shall from time to time promulgate and/or modify. The rules and regulations shall be binding upon the Tenant upon delivery of a copy of them to the Tenant. Landlord shall not be responsible to Tenant for the nonperformance of any said rules and regulations by any other tenant or occupant.

37. FOR LEASE SIGNS. The Landlord may place "For Lease" signs upon the Premises in prominent locations selected by Landlord for the ninety (90) days preceding termination of this Lease.

38. QUIET ENJOYMENT. Landlord covenants and agrees that so long as Tenant remains in full compliance with all of Tenant's obligations under this Lease, Tenant shall lawfully and quietly hold, occupy, and enjoy the Property during the term of this Lease, subject to the other terms and provisions of this Lease and subject to all mortgages, underlying leases, and other underlying matters of record to which this Lease is or may become subject and subordinate. However, Landlord does not guarantee the continued present status of light, air, or view over any premises adjoining or in the vicinity of the Property.

39. MISCELLANEOUS

(a) Integration; Amendments. This Lease contains the entire agreement between Landlord and Tenant concerning the leasing of the Premises. There is no oral or written agreement in addition to those in this Agreement. This Lease may only be altered by written consent of both Landlord and Tenant.

(b) Memorandum of Lease. Unless approved by Landlord in writing, if Tenant causes this Lease or a notice or memorandum thereof to be placed of record, such recording shall constitute a default by Tenant under this Lease. If Landlord so requests, Tenant agrees to execute and place of record an instrument, in recordable form, evidencing the commencement date and expiration date of this Lease, which instrument Landlord may record.

(c) Force Majeure. Landlord shall have no liability whatsoever to Tenant on account of the following acts of "force majeure," which shall include (a) the inability of Landlord to fulfill, or delay in fulfilling, any of Landlord's obligations under this Lease by reason of strike, lockout, other labor trouble, dispute or disturbance, (b) governmental regulation, moratorium, action, preemption or priorities or other controls, (c) shortages of fuel, supplies or labor; (d) any failure or defect in the supply, quantity or character of electricity or water furnished to the Property by reason of any requirement, act or omission of the public utility or others furnishing the Building with electricity or water; and (e) for any other reason, whether similar or dissimilar to the above, or for Act of God, beyond Landlord's reasonable control. If this Lease specifies a time period for performance of an obligation of Landlord, that time period shall be extended by the period of any delay in Landlord's performance caused by any of the events of force majeure described herein.

(d) Captions and Construction. The captions in this Lease are for the convenience of the reader and are not to be considered in the interpretation of its terms.

(e) Interpretation. This Lease has been submitted to the scrutiny of all parties hereto and their counsel if desired, and shall be given a fair and reasonable interpretation in accordance with the words hereof, without consideration or weight being given to its having been drafted by any party hereto or its counsel.

(f) Partial Invalidity. If any term or provision of this Lease or the application thereof to any person or circumstance shall to any extent be invalid or unenforceable, the remainder of this Lease, or the application of such term or provision to persons or circumstances other than those as to which it is invalid or unenforceable, shall not be affected thereby, and each term and provision of this Lease shall be valid and be enforced as written to the fullest extent permitted by law.

(g) Number, Gender, Permissive Versus Mandatory Usage. Where the context permits, references to the singular shall include the plural and vice versa, and to the neuter gender shall include the feminine and masculine. Use of the word "may" shall denote an option or privilege and shall impose no obligation upon the party which may exercise such option or privilege; use of the word "shall" shall denote a duty or an obligation.

(h) Tenant's Liability. Each Tenant, and all general partners of any partnership which is a Tenant, shall be jointly and severally liable under this Lease.

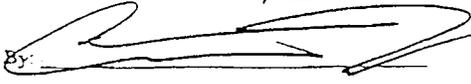
(i) Time. Time is of the essence to all of Tenant's obligations under this Lease.

(j) Governing Law. This Lease shall be governed by the laws of the State of Washington.

(*) Authority to Sign If Tenant is a corporation, a limited liability company, or a limited partnership, each person signing this Lease on behalf of the corporation, company or partnership warrants that he or she has full authority from such corporation, company or partnership to enter into and execute this Lease on behalf of such entity

DATED this 29th day of July, 2004

"Landlord" Northwest Properties
Unlimited, LLC

By:  8/20/04

its Managing member
Curtis Hood

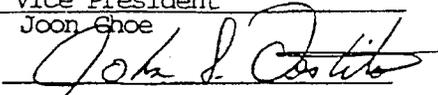
By: _____

its _____

"Tenant" Glacier Water Products, LLC

By: _____

its Vice President
Joon Choe

By:  8/20/04

its President + Managing Partner
John S. Destito



LEASE AGREEMENT
(Multi-Tenant Form - Continued)

BROKER PROVISIONS AND COMMISSION AGREEMENT.

Landlord shall pay a commission to Pac West Brokers, Inc. ("Landlord's Agent") in the amount stated in a separate listing agreement or, if there is no listing agreement, then (check one)

\$ / 5 % (complete only one) of the gross rent payable pursuant to CBA Listing Agreement and as described for any extensions of
 \$ per square foot of the Premises. The commission shall be earned upon occupancy of this lease.
the Premises by Tenant, and paid one-half upon execution of this Lease and one-half upon occupancy of the Premises by Tenant. Landlord's Agent shall pay to ("Tenant's Broker") the amount stated in a separate agreement between them or, if there is no agreement, \$ / % (complete only one) of the commission paid to Landlord's Agent, within five (5) days after receipt by Landlord's Agent. The Premises, described in the attached Exhibits A and B are commercial real estate.

Landlord shall pay to Landlord's Agent an additional commission upon the exercise by Tenant of any option to extend the Term according to any commission agreement or, in the absence of one, according to Landlord's Agent's commission schedule in effect as of the execution of this Lease. If Landlord's Agent is the procuring cause of any other lease or sale entered into between Landlord and Tenant concerning the Premises, Landlord shall pay a commission in the amount set forth in Landlord's Agent's commission schedule in effect as of the execution of this Lease. Landlord's successor shall be obligated to pay any unpaid commissions upon any transfer of this Lease and any such transfer shall not release the transferrer from liability to pay such commissions. If Landlord's Agent is required to employ an attorney to enforce or declare its rights under this Section, the prevailing party in any such action shall be entitled to recover its reasonable attorneys' fees, in an amount determined by the court. Neither Landlord's Agent nor Tenant's Licensee are receiving compensation from more than one party to this transaction unless otherwise disclosed on an attached addendum, in which case Landlord and Tenant consent to such compensation.

LANDLORD'S AGENT AND TENANT'S LICENSEE HAVE MADE NO REPRESENTATIONS OR WARRANTIES CONCERNING THE PREMISES, THE MEANING OF THE TERMS AND CONDITIONS OF THIS LEASE, LANDLORD'S OR TENANT'S FINANCIAL STANDING, ZONING, COMPLIANCE OF THE PREMISES WITH APPLICABLE LAWS, SERVICE OR CAPACITY OF UTILITIES, OPERATING EXPENSES, OR HAZARDOUS MATERIALS. LANDLORD AND TENANT ARE EACH ADVISED TO SEEK INDEPENDENT LEGAL ADVICE ON THESE AND OTHER MATTERS ARISING UNDER THIS LEASE.

AGENCY DISCLOSURE. At the signing of this Agreement,

Landlord's Agent Frank P. Zawislak / Pac West Brokers, Inc.
(Insert name of Licensee and Company name as licensed)

represented Landlord
(Insert Landlord, Tenant, both Landlord and Tenant, or neither Landlord nor Tenant)

and Tenant's Licensee Frank P. Zawislak / PacWest Brokers, Inc
(Insert name of Licensee and Company name as licensed)

represented Landlord
(Insert Landlord, Tenant, both Landlord and Tenant, or neither Landlord nor Tenant)

If Tenant's Licensee and Landlord's Agent are different salespersons affiliated with the same Broker, then both Buyer and Seller confirm their consent to that Broker acting as a dual agent. If Tenant's Licensee and Landlord's Agent are the same salesperson representing both parties, then both Landlord and Tenant confirm their consent to that salesperson and his/her Broker acting as dual agents. Landlord and Tenant confirm receipt of the pamphlet entitled "The Law of Real Estate Agency."

STATE OF WASHINGTON)
) ss
County of Pierce)

I certify that I know or have satisfactory evidence that --- is the person who appeared before me, and said person acknowledged that he/she signed this instrument, on oath stated that he/she was authorized to execute the instrument and acknowledged it as a member of ---, to be the free and voluntary act of such party for the uses and purposes mentioned in the instrument.

DATED this ___ day of _____, 200

Notary Public in and for the State of Washington,
residing at: _____

Name (printed or typed) _____
My appointment expires: _____

STATE OF WASHINGTON)
) ss
County of Pierce)

*NORTHWEST PROPERTIES HOLDINGS, LLC
BY: CURTIS HOOD, MANAGING MEMBER*

I certify that I know or have satisfactory evidence that --- is the person who appeared before me, and said person acknowledged that he/she signed this instrument, on oath stated that he/she was authorized to execute the instrument and acknowledged it as a member of ---, to be the free and voluntary act of such party for the uses and purposes mentioned in the instrument.

DATED this 20th day of August, 2004

Cara L. Wermuth
Notary Public in and for the State of Washington,
residing at: Puyallup WA.
CARA L. WERMUTH
Name (printed or typed)
My appointment expires: 5/25/2007



INDIVIDUAL Acknowledgment

STATE OF _____)
County of Pierce) ss.

I certify that I know or have satisfactory evidence that _____ is the person who appeared before me, and said person acknowledged that he/she signed this instrument and acknowledged it to be his/her free and voluntary act for the uses and purposes mentioned in the instrument.

DATED this ___ day of _____, 2004

Notary Public in and for the State of Washington, residing at: _____

Name (printed or typed) _____
My appointment expires: _____

REPRESENTATIVE CAPACITY Acknowledgment

STATE OF _____)
County of Pierce) ss.

GLACIER WATER PRODUCTS, LLC
By: John Desiro, President & Managing Member

I certify that I know or have satisfactory evidence that _____ is the person who appeared before me, and said person acknowledged that he/she signed this instrument, on oath stated that he/she was authorized to execute the instrument and acknowledged it as the _____ of _____ to be the free and voluntary act of such party for the uses and purposes mentioned in the instrument.

DATED this 20th day of August, 2004

Cara L. Wermuth
Notary Public in and for the State of Washington, residing at: Prunedale WA.

Name (printed or typed) CARA L. WERMUTH
My appointment expires: 5/25/2007



EXHIBIT A
TO
LEASE AGREEMENT

LEGAL DESCRIPTION OF PROPERTY

Pierce

The Property referred to in this Lease Agreement is located in Pierce County, Washington, and is legally described as follows:

Commonly known as: Suite E, 5526 184th St. E.
F, G, H Puyallup, WA 98375
17,535 s/f± Office/Warehouse
1,640 / 15,855

CHICAGO TITLE INSURANCE COMPANY
A.L.T.A. COMMITMENT
SCHEDULE A
(Continued)

LEGAL DESCRIPTION EXHIBIT

LOT 12, PIERCE COUNTY LARGE LOT SURVEY NO. 9601100450, ACCORDING TO MAP THEREOF RECORDED JANUARY 10, 1996, RECORDS OF PIERCE COUNTY, WASHINGTON, AND AS CORRECTED BY AFFIDAVIT OF MINOR CORRECTION OF SURVEY, RECORDED JANUARY 31, 1996, UNDER RECORDING NO. 9601310620, RECORDS OF PIERCE COUNTY, WA; SAID LARGE LOT SUPERCEDES PIERCE COUNTY LARGE LOT SUBDIVISION NO. 9011300746, ACCORDING TO MAP THEREOF RECORDED NOVEMBER 30, 1990, RECORDS OF PIERCE COUNTY, WASHINGTON.

EXCEPT: ANY PORTION THEREOF DEEDED TO PIERCE COUNTY IN DEED RECORDED UNDER AUDITORS FILE NUMBER 9608010592.

ALSO KNOWN AS PARCELS 1 AND 2 OF BINDING SITE PLAN RANGLES LOT 12 RECORDED UNDER RECORDING NUMBER 200306165004.

NOTE: See attached Exhibit 'F' building plan

EXHIBIT B
TO
LEASE AGREEMENT

Description of Premises

Suite E,F,G,H Totalling 15,855 S/F warehouse

Space: Landlord to build out 1,680 S/F
of office space within the warehouse.
840 S/F main floor with 840 S/F of
mezzanine office up.

All final plans will be approved by both
Landlord and Tenant prior to submitting
for building permits. Both parties will
sign a Letter of Agreement prior to the
construction of any tenant improvement.

Any changes to office plans and/or size
of office will reflect changes in cost
and is described in Exhibit 'C'.

EXHIBIT C
TO
LEASE AGREEMENT

Landlord's Work

Landlord to provide a "bay" or "space" of 15,855 S/Ft which shall include (4) grade level doors and (4) dock high loading doors. (4) man doors and (2) "storefront" type sets of glass doors.

Landlord to permit and construct a total of 1,680 s/f of finished 2-story office space as per final agreed to plans by both Landlord and tenant. To include (2) ADA restrooms, stairs to mezzanine, walls floors, doors and HVAC and lighting for the offices. Any and all materials to be agreed to by both parties, in writing and prior to submittal for permits. All work to be completed according to the current Pierce County building and fire codes. Landlord to install (2) 200 amp panels with 208 3-phase. Any other electrical to be permitted and installed by Tenant.

The Tenant shall pay to Landlord an amount of \$30,000.00 of which \$15,000.00 shall be due within 10 days after signing of the lease, and prior to submitting for permits. The remaining \$15,000.00 to be paid within (60) days after final inspection and approval by Pierce County inspectors.

Any changes in the final size of the Tenant office improvement will have adjustments to the Tenant's payment for said improvements. As per example.: \$30,000.00 divided by 1,680 s/f = \$17.86 s/f. The final amount of Tenants compensation to Landlord will be at \$17.86 s/f for total of office improvements. Those changes would occur in writing and prior to submitting for permits.

Both Landlord and Tenant to jointly assist each other during the pre-move in date of occupancy. Both parties will attempt to get a partial use move-in date within (1) month of signing the lease (or ASAP). All rent will be prorated as to the use of warehouse and completed offices from the date of that specific use and occupancy of either.

Any and all of the terms and conditions of this Lease are subject to change upon written agreement between the Landlord and Tenant.

EXHIBIT D
TO
LEASE AGREEMENT

Commencement and Termination Date Agreement

This Agreement is made with respect to the Lease Agreement dated July 29th, 2004 (the "Lease") between A as "Landlord" and B, as "Tenant" for the lease of "Premises" located at C. Any capitalized term not defined in this Agreement has the meaning given it the Lease.

The Lease provides that when certain obligations completed, Landlord and Tenant shall enter into a supplemental agreement confirming the Rent Commencement Date and the Lease Term. Accordingly, the parties agree as follows:

1. The Rent Commencement Date of the Lease is date of occupancy by tenant 10/1/04, 2004 OR ASAP CCO
9/20
2. The Lease Term shall expire on five (5) years from date of occupancy, subject to any provision in the Lease for extending the Lease Term.
3. Tenant's obligation to pay Rent shall commence on the Rent Commencement Date.

DATED this 29th day of July, 2004

'A' "Landlord" Northwest Properties
Unlimited, LLC
By: [Signature]
is Managing member
Curtis Hood

8-20-04

'B' "Tenant" GLACIER WATER PRODUCTS, LLC

By: _____
is Vice President
John Choe
By: [Signature]
is PRESIDENT + managing Partner
John S. Destito

8-20-04

'C' - Premises..... 5526 184th Street E.
Suite E & F & G & H
Puyallup, WA 98375

Exhibit A

Plaintiffs Receivables

	Monthly	# of Months	Total
Rent on Unit EFGH	\$7,451.85	12	\$89,422.20
Rent of Unit D	\$1,607.40	5	\$8,037.00
Total			\$97,459.20

Default Interest on Units EFGH at 12%

Nov	\$49.67
Dec	\$149.02
Jan	\$223.53
Feb	\$298.04
Mar	\$372.55
Apr	\$447.06
May	\$521.57
June	\$596.08
July	\$670.59
Aug	\$745.10
Total	\$4,073.21

Default Interest on Unit D at 12%

Nov	\$10.67
Dec	\$26.74
Jan	\$42.81
Feb	\$53.48
Mar	\$64.28
Apr	\$64.28
May	\$64.28
Jun	\$64.28
Jul	\$64.28
Aug	\$64.28
Total	\$519.38

Total Default Interest **\$4,592.59**

Summary of Plaintiffs Receivables

Rent of Units EFGH	\$89,422.20
Rent for Unit D	\$8,037.00
Interest on rent	\$4,592.59
Total	\$102,051.79

Summary of Defendant's Payments

On Commencement:	\$18,423.42
August Payment	\$7,200.00
September Payment	\$243,200.00
Total Payment to Plaintiff	\$268,823.42

Plaintiffs Receivables	-\$102,051.79
Balance Due Defendant	\$166,771.63

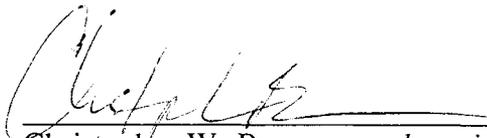
CERTIFICATE

I certify that I caused to be mailed a copy of **APPELLANT'S OPENING BRIEF**, on:

Talis M. Abolins, WSBA #21222
Campbell, Dille & Barnett PLLC
317 South Meridian
Puyallup, WA 98371-0164
Phone : (253) 848-3513

Of Attorneys Respondent

DATED this 28th day of March, 2007.



Christopher W. Brown, *pro hac vice*
Christy O. King, WSBA 37217

Attorneys for Appellant, Glacier Water
Products, LLC

FILED
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DIVISION II
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